

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

In the Matter of Protest of:

CASE NO.: 2007-125

Applied Video Systems, Inc.

Materials Management Office

IFB No. 07-S7547

Statewide Term Contract for New

Audio & Video Tapes & Media Products)

POSTING DATE:

NOVEMBER 2, 2007

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Applied Video Systems, Inc. (Applied). With this invitation for bids (IFB), the Materials Management Office (MMO) attempts to procure statewide term contracts for new audio tapes, video tapes, and media recording products. The IFB requested bids for twenty-four different manufacturer product lines grouped in the IFB as items with the intent of awarding each line item separately. Each line item (group) of the IFB bundled a manufacturer's entire product line of audio tapes, video tapes or media products. Bidders were asked to offer a single percentage discount for each group listed in the IFB. Applied submitted bids for items 2, Audio Tapes by Maxwell, 10, Video Tapes by Maxwell, and 18, Media Recording Products by Maxwell. MMO rejected Applied's bid for all three items finding that Applied bid a separate discount percentage for each product instead of a single discount for each group listed in the IFB. In effect, Applied bid a range of discount percentages for each group. MMO determined that bidding a range of percentage discounts for each group violated the requirements of the IFB.

Applied protested MMO's intent to award items 2, Audio Tapes by Maxwell, 10, Video Tapes by Maxwell, and 18, Media Recording Products by Maxwell, alleging that MMO "rejected (its bid) on a very small technicality."

In order to resolve the matter, the CPO conducted a hearing October 24, 2007. Appearing before the CPO were Applied, represented by Joseph W. Brunson, Jr. and MMO, represented by John Stevens, State Procurement Officer.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On June 27, 2007, MMO issued the IFB. [Ex. 2]
2. On July 10, 2007, MMO issued Amendment # 1. [Ex. 3]
3. On July 11, 2007, MMO issued Amendment # 2. [Ex. 4]
4. On July 30, 2007, MMO opened the bids received. [See Ex. 5 for the tabulation]
5. On August 27, 2007, MMO posted its notice of intent to award. [Ex. 10]
6. On August 30, 2007, the CPO received Applied's protest.

CONCLUSIONS OF LAW

In the IFB, for each line item, MMO asked all bidders to offer a percentage discount off the current catalog price for a group of products. MMO wrote, in part, "Each offeror must list the percentage discount to be taken from the current national/regional manufacturer's price list." [Ex. 2, Percentage Discount, p. 10] MMO wrote further, "Bid prices will be expressed as a "PERCENT DISCOUNT OF MANUFACTURER'S CURRENT LIST PRICE" [Ex. 2, BIDDING CONDITION OF PRICE, p. 9] [Emphasis MMO's] Most relevant to this matter, MMO wrote, "Your price must be in the form of a single percentage discount to apply to a catalog, price sheet, or price schedule as described." [Ex. 2, PRICE AS A DISCOUNT, p. 9] [Emphasis

added] In the bidding schedule, MMO provided space for each bidder to insert a "Percentage Discount" for group. [Ex. 2, pp. 20-25]

Each group of the IFB, or at least, the items under protest here: Item 2, Audio Tapes by Maxwell, Item 10, Video Tapes by Maxwell, and Item 18, Media recording Products by Maxwell, represented a manufacturer's entire product group of catalog items. For example, Item 2, Audio Tapes by Maxwell, included approximately 16 different models of Maxwell audio tapes. Item 10, Video Tapes by Maxwell, included approximately 36 different models of Maxwell video tapes. Item 18, Media Recording Products by Maxwell, included approximately 13 different Maxwell media recording products. For each line item bid, MMO asked the bidders to offer a single percentage discount for the entire group - audio tapes, video tapes, and media recording devices.

Rather than offer a single percentage discount for the entire group, Applied offered a different discount for each model – the 16 different models of audio tapes, the 36 different models of video tapes, and the 13 different models of media recording products. The discounts offered by Applied for Item (Group) 2, audio tapes, ranged from 25% to 50%. The discounts offered by applied for Item (Group) 10, video tapes, ranged from 45% to 79%. The discounts offered by Applied for Item (Group) 18, media recording products, ranged from 42% to 61%.

Applied's bidding method not only violated the simple requirement of the IFB that each bidder offer "a single percentage discount," it made it virtually impossible for MMO to compare Applied's bid to the other bids received. Consequently, MMO rejected Applied's bid as nonresponsive.

Regarding an IFB, the Consolidated Procurement Code reads, "notice of an award or an intended award of a contract to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids must be given by posting the notice at a location specified in the invitation for bids." [11-35-1520(10)] The Code defines a responsive bidder as "a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals." [11-35-1410(7)]

On August 1, 2007, after bid opening, Charles Johnson, MMO Procurement Manager, contacted Mr. Brunson and asked Applied to clarify its bid by offering a single percentage discount for each group. Later that day, Mr. Brunson responded that Applied offered a single discount of 35% for Item 2, 63% for Item 10, and 55% for Item 18.

Under these circumstances, clarification was inappropriate. In an IFB, clarification is allowed only with an obviously responsive vendor. [11-35-1520(8); R. 19-445.2080]. Moreover, the Code does not allow a restatement of bid price after opening. It reads, "After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition must not be permitted." [11-35-1520(7)] Allowing Applied to restate its bid price after a public bid opening is prejudicial to the other bidders.

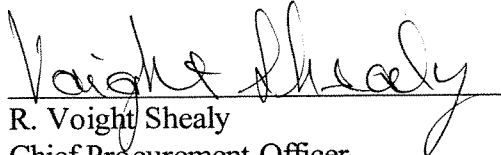
The code allows the State to waive or allow a bidder to cure a minor informality or irregularity in a bid. It reads:

A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State. [11-35-1520(13)]

In this case, however, allowing Applied to restate its bid price (percentage) would have an effect on price. Further, after a public opening, it would have been prejudicial to the other bidders.

DETERMINATION

For the foregoing reasons, the protest is denied.



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

11/2/07

Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of posting of the decision in accordance with Section 11-35-4210(5). The request for review shall be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel and shall be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

Additional information regarding the protest process is available on the internet at the following web site:
www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 66.1 of the 2005 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2005 S.C. Act No. 115, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003). Copies of the Panel's decisions are available at www.state.sc.us/mmo/legal/paneldec.htm